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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF NEVADA**
15

16 IN RE WAL-MART WAGE AND HOUR
17 EMPLOYMENT PRACTICE LITIGATION
18

19 **MDL 1735**
20

21 2:06-CV-00225-PMP-PAL
22 (BASE FILE)
23

24 THIS DOCUMENT RELATES TO:
25
26 ALL ACTIONS EXCEPT KING v.
27
28 WAL-MART STORES, INC., CASE NO.
29
30 07-1486-WY
31

32
33 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION**
34 **FOR APPEAL BOND FOR OBJECTOR FATIMA ANDREWS**
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TABLE OF CONTENTS

I.	PROCEDURAL AND FACTUAL BACKGROUND.....	4
II.	GOVERNING RULES AND STANDARD OF REVIEW	8
III.	ARGUMENT.....	10
A.	The Amount of the Requested Bond is Appropriate	12
1.	Permitted Taxable Costs Include Preparation and Transmission of the Record, Reporter's Transcript, and the Fee for Filing Notice to Class Members.....	12
a.	Preparation and Transmission of the Record.....	13
b.	Cost for Reporter's Transcripts	13
2.	Administrative Costs.....	14
3.	Deposition Costs Should be Included in the Bond.....	15
4.	Interest on the Class Settlement, Attorney's Fees and Costs Should be Included in the Bond	15
B.	The Court has the Power to Require Andrews to Post a Bond Under the Circumstances at Bar.....	16
1.	Objector Andrews Submitted No Financial Information to	

1	Indicate She is Financially Unable to Post Bond Despite the	
2	Opportunity to Provide the Court with this Information	17
3		
4	2. Objector Andrews is Not a Resident in a Ninth Circuit State	
5	Raising Significant Difficulties in Collecting Appellate Costs.....	18
6		
7	3. Objector Andrews' Appeal is not Likely to Succeed.....	20
8		
9	a. After Extensive Review and Consideration by this Court, the	
10	Settlement Amount was Found Fair, Reasonable and Adequate	
11	and was both Preliminarily and Finally Approved	
12	Under Ninth Circuit Law.....	23
13		
14	b. The Fee Award was Found Fair and Appropriate Under Ninth Circuit	
15	Law and Expert Opinions Support Using the Settlement Ceiling, Not	
16	the Floor, as an Appropriate Figure to Base Fees on.....	23
17		
18	4. Whether Objector Andrews' Appeal Shows Bad Faith and Vexatious	
19	Conduct Need Not be Considered	27
20		
21	IV. CONCLUSION	31
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

3	<i>Adsani v. Miller</i>	
4	139 F.3d 67 (2nd Cir. 1998)	21
5		
6	<i>Air Separation v. Underwriters at Lloyd's of London</i>	
7	45 F.3d 288 (9 th Cir. 1994)	11, 16
8		
9	<i>Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y.</i>	
10	421 U.S. 240 (1975)	24
11		
12	<i>Azizian v. Federated Dept. Stores</i>	
13	499 F.3d 950 (9 th Cir. 2007)	13, 20, 21, 28, 29
14		
15	<i>Barnes v. FleetBoston Financial Corp.</i>	
16	2006 U.S. Dist. LEXIS 71072 (D. Mass.)	29, 30
17		
18	<i>Benacquisto v. American Express</i>	
19	00cv1980, (D. Mn)	29
20		
21	<i>Boeing Co. v. Van Gemert</i>	
22	444 U.S. 472 (1980)	24
23		
24	<i>Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.</i>	
25	2008 U.S. Dist. LEXIS 45726 (E. D. Mich. 2008)	17
26		
27	<i>Clark v. Experian Information Solutions, Inc.</i>	
28	2004 U.S. Dist. LEXIS 28324 (D.S.C.)	21, 29

1		
2	<i>Curry v. Fairbanks Capital Corp.</i>	
3	03cv10895 (D. Mass. 2004)	29
4		
5	<i>Davis v. UST,</i>	
6	No. 17305 II, Circuit Court for Jefferson County, TN	29
7		
8	<i>Donovan v. Sovereign Secur., Ltd. .</i>	
9	726 F.2d 55 (9 th Cir. 1984)	10, 15
10		
11	<i>Fleury v. Richemont North America, Inc.</i>	
12	2008 U.S. Dist. LEXIS 88166 (C.D. Cal. 2008)	8, 17, 18, 20, 23, 30
13		
14	<i>Galanti v. The Goodyear Tire & Rubber Company</i>	
15	03cv209 (D.N.J.)	29
16		
17	<i>Hanlon v. Chyrsler Corp.</i>	
18	150 F.3d 1011 (9 th Cir. 1998)	24
19		
20	<i>Hensley v. Eckerhart</i>	
21	461 U.S. 424 (1983)	24
22		
23	<i>Hughes Air West, Inc.</i>	
24	557 F. 2d 759 (9th Cir. 1977)	24
25		
26	<i>Iliadis, et al. v. Walmart Stores, Inc., et al.</i>	
27	Superior Court of New Jersey, Middlesex County, Docket No. MID-L-5498-02	5
28		

1	<i>In Re Allstate Fair Credit Reporting Acti Litigation</i>	
2	(M.D. Tenn.).....	29
3		
4	<i>In re Airline Ticket Comm'r Antitrust Litig.</i>	
5	953 F. Supp. 280 (D. Minn. 1997).....	25
6		
7	<i>In re Am. President Lines</i>	
8	779 F.2d 714 (D.C. Circuit 1985).....	21
9		
10	<i>In re Broadcom Corp. Secs. Litig.</i>	
11	2005 U.S. Dist. LEXIS 45656 (C.D. Cal. 2005)	9
12		
13	<i>In re Catfish Antitrust Litig.</i>	
14	939 F.Supp. 493 (N.D. Miss. 1996).....	25
15		
16	<i>In re Charter Communications, Inc.</i>	
17	MDL 1506, 02cv1186 (E.D. Mo. 2005)	29
18		
19	<i>In re Compact Disc Minimum Advised Price Antitrust Litigation,</i>	
20	MDL 1361 (D. Me. 2003)	29
21		
22	<i>In Re Daimlerchrysler, et al.</i>	
23	00cv993 (D. Del.)	29
24		
25	<i>In re Disposable Contact Lens Antitrust Litigation</i>	
26	MDL 1030 (M.D. Fla.)	29, 30
27		
28	<i>In re Heritage Bond Litig.</i>	

1	2005 U.S. Dist. LEXIS 13627 (C.D. Cal. 2005)	9
2		
3	<i>In re Lorazepam & Clorazepate Antitrust Litig.</i>	24, 25
4	2003 WL 22037741 (D.D.C. 2003)	
5		
6	<i>In re Lucent Technologies, Inc. Securities Litigation</i>	
7	327 F. Supp. 2d 426 (D.N.J. 2004).....	29
8		
9	<i>In re: Managed Care, et al.</i>	
10	MDL 1334 (S.D. Fla.)	29
11		
12	<i>In re: MCI-Subscriber Telephone Rates Litigation</i>	
13	MDL 1275, 99cv1275 (S.D. Ill.)	29
14		
15	<i>In re NE Mutual Life MDL, et al.</i>	
16	96cv11534 (D. Mass.)	29
17		
18	<i>In re Pacific Enter. Sec. Litig.</i>	
19	47 F. 3d 373 (9th Cir. 1995).....	24
20		
21	<i>In re PayPal Litigation</i>	
22	2004 U.S. Dist. LEXIS 22470 (N.D. Cal. 2004)	29
23		
24	<i>In re Relafen Antitrust Litigation</i>	
25	231 F.R.D. 52 (D. Mass. 2005)	29
26		
27	<i>In re Rite Aid Corp.</i>	
28	MDL 1360 (E.D. Pa.)	29

1	
2	<i>In re Royal Ahold N.V. Securities & ERISA Litigation</i>
3	461 F. Supp. 2d 383 (D. Md. 2006).....29, 30
4	
5	<i>In re Serzone Products Liability Litigation</i>
6	MDL 1447 (S.D.W.V. 2005).....29
7	
8	<i>In re SmithKline Beecham Corp. Sec. Litig.</i>
9	751 F.Sup. 525 (E.D. Pa. 1990).....25
10	
11	<i>In re Visa Check/Mastermoney Antitrust Litigation</i>
12	192 F.R.D. 68 (E.D.N.Y. 2004).....29
13	
14	<i>In re Warfarin Sodium Antitrust Litigation</i>
15	212 F.R.D. 231 (D. Del. 2002)
16	29
17	<i>Kaiser Aluminum & Chem. Corp. v. Bonjorno</i>
18	494 U.S. 827 (1990)
19	10, 15
20	<i>Lachance v. United States Smokeless Tobacco</i>
21	No. 2006-2007 564. (N.H. 2006).....29
22	
23	<i>Landreneau v. Fleet Bank (RI) National Ass'n</i>
24	01cv26 (M.D. La.)
25	29
26	<i>Lindmark v. American Express</i>
27	00cv8658 (C.D. Cal.).....29
28	

1	<i>Lipuma v. American Express</i>	
2	04cv20314 (S.D. Fla.).....	29
3		
4	<i>Mangone v. First USA Bank</i>	
5	206 F.R.D. 222 (S.D. Ill. 2001)	29
6		
7	<i>Masters v. Wilhelmina Model Agency, Inc.</i>	
8	473 F.3d 423(2d Cir. 2007)	14, 23, 27
9		
10	<i>Meyenburg v. Exxon Mobil Corp.</i>	
11	05cv15	29
12		
13	<i>Ouellette, et al. v. Wal-Mart Stores, Inc., et al.</i>	
14	Circuit Court for Washington County, Florida, File No. 67-01-CA-326	5
15		
16	<i>Pace Design & Fab. v. Stoughton Composites</i>	
17	1997 U.S. App. LEXIS 35780 (9 th Cir. 1997)	10, 15
18		
19	<i>Paul, Johnson, Alston & Hunt v. Grauity</i>	
20	886 F.2d 268 (9th Cir. 1989)	24
21		
22	<i>Perkins v. Standard Oil Co.</i>	
23	487 F. 2d 672 (9 th Cir. 1973)	10, 16
24		
25	<i>RBFC ONE, LLC v. Timberlake</i>	
26	2005 U.S. Dist. LEXIS 19148 (2d Cir. 2005)	8
27		
28		

1	<i>Roasted v. First USA Bank</i>	
2	97cv1482 (W.D. Wash.)	29
3		
4	<i>Rodriguez v. West Publishing Corp.</i>	
5	563 F. 3d 948 (9th Cir. 2009)	24
6		
7	<i>Schwartz v. Citibank</i>	
8	00cv75 (C.D. Cal.).....	29
9		
10	<i>Schwartz v. Dallas Cowboys Football</i>	
11	97cv5184 (E.D. Pa.)	29
12		
13	<i>Six Mexican Farm Workers v. Arizona Citrus Growers</i>	
14	904 F. 2d 1301 (9th Cir. 1990)	24
15		
16	<i>Spark v. MBNA Corp.</i>	
17	289 F. Supp.2d 510 (D. Del. 2003)	29
18		
19	<i>Synfuel Technologies, LLC v. Airborne Express, Inc.</i>	
20	02cv324 (S.D. Ill.)	29
21		
22	<i>Taubenfeld v. Aon Corp.</i>	
23	415 F.3d 597 (7th Cir. 2005)	29
24		
25	<i>Tenuto v. Transworld Systems, Inc.</i>	
26	2002 WL 188569 (E.D. Pa.).....	29
27		
28	<i>Torrissi v. Tucson Elec. Power Co.</i>	

1	8 F.3d 1370 (9 th Cir. 1993)	24
2		
3	<i>Tri-Star Pictures, Inc. v. Unger</i>	
4	32 F. Supp. 2d 144 (2d Cir. 1999)	8
5		
6	<i>Varacallo v. Massachusetts Mutual Life Insurance Company</i>	
7	04cv2702 (D.N.J.)	29
8		
9	<i>Venen v. Sweet</i>	
10	758 F.2d 117 (3d Cir. 1985)	8
11		
12	<i>Vizcaino v. Microsoft Corp.</i>	
13	290 F. 3d 1043 (9th Cir. 2002)	24, 25
14		
15	<i>Washington State Dep't of Transp. V. Washington Nat. Gas Co.</i>	
16	59 F.3d 793 (9 th Cir. 1995)	15
17		
18	<i>Williams v. MGM-Pathe Communications Co.</i>	
19	129 F.3d 1026 (9 th Cir. 1997)	13, 23, 27
20		
21	<i>Wing v. Asarco Inc.</i>	
22	114 F.3d 986 (9th Cir. 1997)	24
23		
24	<i>Zawikowski v. Beneficial National Bank</i>	
25	98cv2178 (N.D. Ill.)	29
26		
27	<u>Other Authorities</u>	
28		

1 28 U.S.C. § 1961

2 28 U.S. C § 1920

3 29 U.S.C. §§206, 207(a), 211(c), 215, 216(b)

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5 Fed. R. App. Proc. 7

6

7 Fed. R. Civ. P. 23(e)

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9 Fed. R. Civ. P. 11(c)(2)

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11 Fed. R. Civ. P. 39(c)

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13 Fed. R. Civ. P. 54(d)

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Pursuant to Rule 7 of the Federal Rules of Appellate Procedure and the District Court's inherent power, Plaintiffs have moved this Court for an Order requiring Objector Fatima Andrews (hereafter, "Objector," "Objector Andrews," or "Andrews") to post an appeal bond in the amount of \$608,972.28. This request is limited to the actual costs that the Class will incur, specifically enumerated below, and the costs are fully supported in the accompanying attachments.

In her related filing, Ms. Andrews limited her appeal to the award of attorneys' fees only. *See Docket no. 522, Notice of Appeal, December 1, 2009.* It is her opinion that this Court abused its discretion by exceeding the benchmark 25% fee and awarding Class counsels 33% of the total funds made available through the Settlement.¹ *See Final Approval Order, Docket no. 491 (hereafter, "Final Approval Order").*

Fatima Andrews did not take into account this Court's evaluation of the accepted Ninth Circuit criteria for awarding fees or its findings that supported the upward increase of fees over the benchmark² in either her objection or appeal. In addition to not even mentioning a single one of the numerous evaluative criteria this Court worked through in rendering its related findings and orders, the objection and appeal scarcely acknowledge any factual considerations presented by this specific litigation. It is worth noting that, after filing her original objection, Andrews chose not to supplement or amend it, despite the obvious material changes in circumstances that first came with the filing of the Plaintiffs' submissions in support and later with the supporting findings and Orders of this Court. Her appeal also failed to take those material factors into account.

¹ Andrews lacks standing to contest attorney fees because she did not file a claim. *See Knisley v. Network Associates, Inc.* 2002 U.S. App. LEXIS 24657, *7 (9th Cir. 2002).

1 In addition to failing to provide any factual support from the record, to date Andrews has
 2 utterly failed to offer any relevant or thoughtful analysis on the legal issues. As more fully
 3 described below, the legal citations in her filings are either inapplicable or inapposite. For
 4 example, the self-serving opinions offered to persuade this Court to limit the amount of the bond
 5 unrealistically attempt to extend the holding in the *Azizian*, without taking the time to even gloss
 6 over the countervailing considerations established in the uncontested public policy that
 7 support appellate bonds. The interpretations of the scant applicable legal authority offered by
 8 Andrews, in her objection, are so far off they will certainly be wholly rejected in favor of this
 9 Court's own thoughtful analysis and application of the law. The failure of her appeal is obvious.

12 In the exercise of its discretion, this Court may assess an appellate bond that serves to
 13 protect the class and satisfy public policy. In fact, the protections afforded only through
 14 appellate bonds are necessary in the context of this litigation to prevent the Class from incurring
 15 significant economic loss. The express terms of the Settlement Agreement make clear that the
 16 funding of the Qualified Settlement Fund (hereafter "QSF") will occur only after all appeals are
 17 exhausted. The Class members have already begun to lose the ascertainable economic value of
 18 the daily compounding post-judgment interest.³ Additionally, the class has already been forced
 19 to begin to pay the costs of the administration during the interim appeal period. Justice will be
 20 best served through the assessment of the requested bond because the appeal by Andrews has
 21 already caused the Class to suffer significant economic and non-economic loss.⁴

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 26 ² The same is true for the Order on Final Approval which Andrews initially objected to. She failed to take into
 27 account this Courts evaluation of the accepted Ninth Circuit criteria as well as its findings.

27 ³ The funding of the monetary component does not occur until after all appeals are exhausted and final judgment has
 28 entered. *See* Docket no. 432, Declaration of Nicole Vamosi, in Support of Final Approval, Attachment A, October
 2, 2009, at ¶¶ 1.39, 6.2.

⁴ In addition to losing the value of the present use of money and they have also lost the right to enforce the benefits
 of the injunctive relief afforded through the settlement.

1 The Ninth Circuit has held that FRAP 7 includes, but is not limited to, "all costs properly
 2 awardable at the conclusion of the appeal," as FRAP 39(e) does not contain "any expression to
 3 the contrary." *Azizian*, 499 F.3d at 958. There can be no dispute that "Rule 39(e) provides: The
 4 following costs on appeal are taxable in the district court for the benefit of the party entitled to
 5 costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's
 6 transcript, if needed to determine the appeal; (3) the premiums paid for a supersedeas bond or
 7 other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal." *In*
 8 *Re Broadcom Corp.*, 2005 U.S. Dist. LEXIS 45656, at *7-8. Importantly here, the Ninth Circuit
 9 also made clear that, "[T]he costs identified in Rule 39(e) are among, but not necessarily the
 10 only, costs available on appeal [for purposes of Rule 7]." *Azizian*, 499 F.3d at 958. The
 11 appropriate costs on appeal for purposes of Rule 7 are thus to be evaluated on a case by case
 12 basis, and imposition of the bond requested remains a matter that will ultimately be decided
 13 through this Court's exercise of its discretion, after careful evaluation of all the attendant
 14 circumstances.

15 The objectors have conceded in the record that the assessment of a bond is expected. *See*
 16 Appellants Jessica Gaona and Deborah Maddox's (sic) Joint Response to Class Counsel's Motion
 17 for Bond Appeal (Docket no. 558), January 19, 2010; *See also* Docket no. 556 (hereafter, "Joint
 18 Response"). This is not surprising as the assessment of appeal bonds have played an important
 19 role in American jurisprudence for many years.⁵

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⁵ Federal Rule of Appellate Procedure 7 is derived from former Federal Rule of Civil Procedure 73(c) and provides that, "the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R.App. P. 7.

1 In support of their Bond Motion, Plaintiffs submit this memorandum of points and
 2 authorities, including its attachments.⁶ Defendant Wal-Mart supports the assessment of a bond.
 3

4 Finally, the undersigned counsels did not join in the Request for Bond submitted by Co-
 5 Lead Counsel Carolyn Beasley-Burton (hereafter, "Beasley-Burton") and objected to it.⁷

6 **I. PROCEDURAL AND FACTUAL BACKGROUND**

7 The related procedural and factual background is well known to this court. For sake of
 8 brevity, the full background is not repeated. The details provided in the prior memorandums that
 9 supported requests for the assessment of Appellate Bonds upon the other Objectors are
 10 incorporated herein by reference. However, there are certain specific procedural and factual
 11 background matters relating to the Andrews appeal that have not yet been offered for the Court's
 12 consideration.

13 Objector Andrews did not submit a claim by the September 24, 2009 deadline established
 14 by the Court. Objector Andrews did not opt to exclude herself from the Settlement.⁸ Exercising
 15 that option would have given her an unrestricted right to individually advance any and all claims
 16 of liability and/or damages, without blocking the other Class Members from the present receipt
 17 of the benefits offered through the Settlement. The record establishes that Andrews and her
 18 Counsel knew their choice would block funding of the Qualified Settlement Fund, and that by
 19 choosing to object, they would effectively deny participating Class Members the benefit of the
 20 present use of the Settlement monies and the entitlement to interest on those funds during the
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 25 ⁶ Plaintiffs otherwise rely on the submitted record in this litigation.

26 ⁷ Since September of 2009, Carolyn Beasley Burton and the Mills firm have developed a pattern and practice of
 27 acting without the advance knowledge and consent of Beasley's Co Lead and all the other Class Counsel that
 28 extends beyond the filing of her singular request for a bond against all Objectors that contained obvious errors of
 law. Plaintiffs incorporate the prior comments on that filing herein by reference. *See* Objection to Beasley Bond
 Request. Unfortunately this is *at least* the fourth time she has unilaterally acted, and attempts to stop this detrimental
 practice have been wholly unsuccessful.

1 pendency of any Appeal. *See* Attachment A, Objection, Docket no. 385, September 24, 2009
 2 (hereafter, "Andrews Objection" or "Objection").

3 After filing her original Objection on September 24, 2009, Andrews and her counsel,
 4 Professional Objectors John Pentz and Edward Cochran, took no action what so ever until they
 5 filed the Notice of Appeal. *See* Doc. no. 522, December 1, 2009. They failed to address,
 6 acknowledge or rebut the significant and highly relevant facts established through the
 7 submissions the Plaintiffs filed in support of Final Approval, those that were introduced during
 8 hearing, or otherwise object to the detailed findings of this Court.⁸ Request is hereby made that
 9 the Court deem admitted any facts and declarations which were not sufficiently rebutted by
 10 Andrews in Plaintiffs' bond related motions, replies, declarations and exhibits.

11 While the deficient original submission, and/or the failure to later act in the face of the
 12 materially changed circumstances are fatal to the Andrews appeal, there is additional relevant
 13 factual and procedural background. Plaintiffs' Counsel duly noticed the deposition of Objector
 14 Andrews for October 12, 2009 (moved from the initial date of October 7, 2009 with permission
 15 from the Court). *See* Docket no. 447-3, Notice to Take Deposition of Fatima Andrews, October
 16 6, 2009. The Deposition Notice provided Andrews with notice that her deposition was to be
 17 taken on October 12, 2009, at 4:00 p.m., at the Law Office of Andrew Krembs, 55 Public Square,
 18 Suite 1700, Cleveland, Ohio 44113. A copy of the Deposition Notice was served upon her
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 24 ⁸ Andrews is not presently employed by Wal-Mart. *See* Doc no. 385 Objection to Class Action Settlement and
 25 Request for Attorney Fees, and Notice of Intent to Appear.

26 ⁹ In fact, Attorney Pentz has objected in two other recently reached Wal-Mart Wage and Hour settlement cases. *See*
 27 *Iliadis, et al. v. Wal-mart Stores, Inc., et al.* (Superior Court of New Jersey, Middlesex County, Docket No. MID-L-
 28 5498-02), on behalf of objector Charles Ogelsby; and *Ouellette, et al. v. Wal-Mart Stores, Inc., et al.* (Circuit Court
 for Washington County, Florida, File No. 67-01-CA-326), on behalf of objectors John Buck and Gary Williamson.
 In *Iliadis*, his client's objection was overruled by the Court. Pentz filed an appeal from that ruling on January 6,
 2010. In *Ouellette*, his clients' objection was also overruled by the Court, and Pentz did not file an appeal. In
 addition, he has filed objections in this case, MDL 1735, on behalf of not only Objector Andrews, but also Objector
 Stephanie Swift.

1 counsel, Pentz and Cochran, through electronic service on October 6, 2009. In addition, the
2 Deposition Notice also provided that Class Counsel agreed the location could be moved to
3 Andrews' Counsel's office. *Id.*

4
5 On October 9, 2009, Judge Polster of the United States District Court for the Northern of
6 Ohio - Eastern Division granted a motion to compel the attendance of Objector Andrews at the
7 October 12, 2009 deposition. *See* Attachment B, Ohio Order Granting Complaint for Discovery,
8 October 9, 2009.

9
10 Also, on October 9, 2009, at 6:26 p.m., Process Server Clint Massengale (hereafter,
11 "Massengale"), an employee of New Age Delivery, Courier and Freight, served the Deposition
12 Subpoena personally upon Andrews at her residence at 16305 Trafalgar Street, Cleveland, Ohio,
13 44110. *See* Docket no. 458, Subpoena, October 12, 2009. *See* Attachment C, Subpoena of
14 Fatima Andrews and Return of Process Server Clint Massengale. Despite being served both
15 personally and electronically the Subpoena and Deposition Notice, neither Andrews nor her
16 Counsel appeared for the scheduled deposition. Objector Andrews never sought or obtained a
17 protective order. *See* Attachment D, Transcript of Andrews Deposition.

18
19 On October 19, 2009, this Court held the Final Fairness Hearing in accordance with its
20 order of Notice. *See* Docket no. 482, Minutes of the Court. The Court explicitly reserved time
21 and invited comments from the Objectors and anyone else that wished to be heard. Fatima
22 Andrews and her counsel chose not to participate in the Fairness Hearing. Instead they filed a
23 Notice of Non-Appearance on the day of the scheduled hearing. *See* Docket no. 468, Notice of
24 Non-Appearance. There is no explanation in the record as to why she and/or her attorney chose
25 not to attend or, alternatively, failed to request an appearance by telephone in order to eliminate
26 cost as a supporting rationale. At the close of the hearing, the Court expressly stated that it
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1 wished the Objectors were present to have considered the evidence presented and the matters
 2 discussed at the Final Fairness hearing. In addition to not attending, Fatima Andrews and her
 3 Counsel never ordered the transcript of the hearing prior to filing the Notice of Appeal.
 4

5 On November 2, 2009, in its Final Approval Order, after carefully considering and
 6 expressly taking into account the evidence offered within the voluminous filings, the evidence
 7 offered at and subsequent to the hearing, and, based upon its own expansive institutional
 8 knowledge and grounded understanding of the intricacies of this litigation as well as the efforts
 9 of the counsels for the respective parties, this Court granted Final Approval of the Settlement,
 10 thereby effectively overruled Andrews's Objection. *See* Docket no. 491, Final Approval Order
 11 at 4,. *See also* Minutes of the Final Approval Hearing at 3, Docket no. 482

13 The deadline for receipt of all claim forms was November 9, 2009. *See* Settlement
 14 Agreement at ¶ 8. Objector Andrews did not file a claim for compensation with the settlement
 15 claims administrator, Rust.¹⁰ Ms. Andrews thus lacks standing to appeal the order on fees.
 16 Remarkably, in her Objection and Appeal, Ms. Andrews does not identify the basis upon which
 17 she claims to have standing to appeal the award of attorney fees or even mention the *Knisley*
 18 decision. *Knisley v. Network Associates, Inc.* 312 F.3d 1123, 1126 (9th Cir. 2002).

20 On November 2, 2009, this Court approved Plaintiffs' Motion for Final Approval of
 21 Settlement and entered final judgment, reserving an award of attorney's fees, expenses and
 22 incentive payments to the Plaintiffs. *See* Docket no. 491, Final Approval Order.

24 On November 20th, 2009, this Court held a follow-up hearing on the issue of fees,
 25 expenses and incentive awards, having the benefit of additional briefing and expert reports. *See*
 26 Docket no. 520, Minutes, November 20, 2009. The record establishes that Andrews did not file
 27

any supplemental submission for the Court's consideration in advance of the second hearing on fees, expenses and incentive awards. Again, despite notice to all parties, including objector Andrews and her counsels, she offered no evidence; she failed to appear for any of the scheduled hearings relevant to her objection and did not submit any request to participate by telephone.

On December 1, 2009, Objector Andrews filed her appeal as to the award of attorney's fees only. *See* Notice of Appeal, Docket no. 522. Prior to doing so, she never acted to amend, update or supplement her original filing. Andrews did not order a copy of any MDL 1735 transcript prior to filing her appeal.

Plaintiffs have now moved for an appeal bond under Fed. R. App. Proc. 7.

II. GOVERNING RULES AND STANDARD OF REVIEW

Rule 7 of the Federal Rules of Appellate Procedure (hereafter, "FRAP 7") empowers a United States District Court in its discretion to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. The purpose of an appeal or cost bond in circumstances such as the present one is "to protect the amount the appellee [class] stands to have reimbursed," including the costs of delaying payment of the judgment, should the appeal ultimately fail. *See Fleury v. Richemont North America, Inc.*, 2008 U.S. Dist. LEXIS 88166, at *18-19 (C.D. Cal. 2008) (further citations omitted). A Federal District Court retains jurisdiction after the filing of an appeal to issue orders regarding the filing of bonds under FRAP 7.¹⁰ While FRAP 7 does not expressly provide a list of factors to consider in determining whether to require a bond, other courts, including the Northern District of California, have relied upon a variety of accepted factors including: (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay the

¹⁰ *See* Attachment E Affidavit of Amanda Myette Relating to the Failure of Objectors Gaona and Andrews to File a

1 appellee's costs if the appeal loses; (3) the merits of the appeal;¹² and (4) whether the appellant
 2 has shown bad faith or vexatious conduct.¹³ See *Fleury*, 2008 U.S. Dist. LEXIS 88166, at *19.
 3 The District Court's findings and rulings on the amount of any cost and/or appeal bond are
 4 subject to an abuse of discretion standard of review.¹⁴

5 The law is clear, when Objector Andrews' appeal fails, she, not the members of this class,
 6 will be required to pay for the related ascertainable economic harm that her baseless appeal
 7 causes to accrue and the class is to be protected from absorbing that loss through the appellate
 8 bond process. Applying the applicable principals of law, and the public policy that appellate
 9 bonds are intended to serve to the present circumstances, Andrews should justly be made to
 10 bonds are intended to serve to the present circumstances, Andrews should justly be made to
 11 guarantee the full measure of her ultimate financial responsibility. It was her voluntary choice of
 12 action that prompts this request. Prior to filing her appeal, Andrews' counsels no doubt advised
 13 her as to the related costs and risks, including the fact that a bond would be sought. No
 14 affirmative action of the class can be tied to their need for the security afforded by a bond.
 15

16 The class is entitled by law to be protected from what will otherwise be a significant
 17 unrecoverable economic loss. The law does not require the class to be forced to pay the costs of
 18 Andrews' appeal¹⁵ or that they be forced to assume the risk Andrews will not be able to pay the
 19 related costs when her appeal fails. Requiring the Class to eventually be held to pay the costs of
 20

22 Claim, Rust Consulting, at ¶ 7, January 19, 2010

23 ¹¹ *Venen v. Sweet*, 758 F.2d 117, 120 n.2 (3d Cir. 1985).

24 ¹² See also *RBFC ONE, LLC v. Timberlake*, 2005 U.S. Dist. LEXIS 19148, at *3-4 (S.D.N.Y. 2005); *Tri-Star*
 Pictures, Inc. v. Unger, 32 F. Supp. 2d 144, 147-49 (S.D.N.Y. 1999).

25 ¹³ It is the impression of the practicing bar that this factor has not been favorably received by the Ninth Circuit. See
 Azizian, 499 F.3d at 961.

26 ¹⁴ *Azizian*, 499 F.3d at 955 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (as
 amended)). See also *In re Broadcom Corp. Secs. Litig.*, 2005 U.S. Dist. LEXIS 45656, at *6-7 (C.D. Cal. 2005)
 ("[t]he determination of the amount of a bond necessary to ensure payment of costs on appeal is left to the discretion
 of the district court"); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *2 (C.D. Cal. 2005) ("Heritage
 Bond") (citing *Young v. New Process Steel*, 419 F.3d 1201, 1203 (11th Cir. 2005)).

1 appeal that are due from Andrews is unjust. It certainly runs counter to the longstanding public
 2 policy supporting appellate bonds. The class vehemently objects and demands that Andrews be
 3 made to carry her own financial burden and assume her own risk- the risk of ultimately being
 4 responsible for costs on appeal.

5 Post-judgment interest is mandatory for any money judgment pursuant to 28 U.S.C.
 6 § 1961.¹⁶ The purpose of an appellate bond is to compensate a successful plaintiff for not being
 7 paid during the time of the award and payment.¹⁷ In fact, not only is post-judgment interest
 8 assessable upon the judgment, but in certain circumstances, where a fee shifting provision is
 9 applicable, it is also separately to be determined upon attorney's fees¹⁸ and costs.¹⁹ The
 10 Plaintiffs, through the undersigned counsels who join in this request, expressly do not make a
 11 such claim for interest on those fee shifting and costs considerations here.

14 III. ARGUMENT

15 This Court should require Objector Andrews to file an appeal bond because it is the only
 16 available means to protect the interests of the Class from ascertained economic harm. Further,
 17 only an appeal bond will ensure that Andrews will make good on the payment of all costs
 18 incurred as a result of her appeal, when it ultimately fails and the time comes for her to pay. The
 19 facts and circumstances specific to this case, make clear that the Andrews' appeal forces upon
 20 the Class needless cost and delay by blocking entirely Plaintiffs' receipt of the economic and
 21 injunctive recovery provided by the Settlement. This request for security is reasonable,
 22

24
 25¹⁵ Andrews is easily distinguished from other traditional appellants. Here, it is not her own perceived cause that she
 26 advances. She rejected the option of opting out and prosecuting her own claim, Instead she seeks to advance the
 27 cause of the very persons who object to her doing so.

¹⁶ *Donovan v. Sovereign Secur., Ltd.*, 726 F.2d 55, 58 (9th Cir. 1984).

¹⁷ *Pace Design & Fab. v. Stoughton Composites*, 1997 U.S. App. LEXIS 35780, at *2-3 (9th Cir. 1997) (citing
Donovan, 726 F.2d at 58); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

¹⁸ *Perkins v. Standard Oil Co.*, 487 F.2d 672, 676 (9th Cir. 1973).

1 necessary and falls squarely within the law and the public policy supporting the assessment of
 2 bonds.²⁰ The eventual failure of Andrews' appeal is as obvious as the fact it is meritless. On
 3 balance, justice requires that the Class, as well as Andrews, be offered the full measure of
 4 protection available to them under the law.²¹ This reasonable protection afforded to the Class by
 5 law fairly addresses the future ascertainable loss by eliminating unnecessary and reasonably
 6 expected obstacles to the prompt resolution of the certain future claim against Objector Andrews
 7 when her appeal fails.

8 As to the costs to be included in the bond, Plaintiffs request the following:

- 9 1.) \$5,538.20 as the cost for the preparation and transmission of the record, specifically,
 10 the costs of printing and copying briefs and other submissions. *See* Declaration of
 11 Robert Bonsignore in Support of Plaintiff's Motion for Appeal Bond for Objector
 12 Fatima Andrews at Paragraph 25
- 13 2.) \$1,403.90 as the cost for reporter's transcripts. *See* Declaration of Robert Bonsignore
 14 in Support of Plaintiff's Motion for Appeal Bond for Objector Fatima Andrews at
 15 Paragraph 22.
- 16 3.) \$200,000.00 for the administrative fees/costs associated with this appeal. *See*
 17 Declaration of Amanda Myette, Exhibit V to Plaintiff's Motion for Appeal Bond for
 18 Objector Stephanie Swift. Swift has advanced that administrative costs are an
 19 improper component of an appellate bond. *See* Docket No. Docket no. 556,
 20 Appellants Jessica Gaona, Stephanie Swift, Deborah Maddox and Fatima Andrews'
 21 Joint Response to Plaintiff's Nancy Hall's Motion for a Bond for Appeal, January 4,
 2010, at 2. In the alternative is the direction of Objector Andrews to set the bond
 including \$1,680,770.36, the cost of notice. *See e.g.* Attachment F, Affidavit of
 Amanda J. Myette Relating to Cost of Class Notice dated January 21, 2010.
- 22 4.) \$69.18 for the cost of the special process server and \$130.00 for the cost of Andrews'
 23 non-appearance at the Deposition. This is a total of \$199.18. *See* Declaration of

25 ¹⁹ *Air Separation v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1994) (quoting *Wheeler v. John*
 26 *Deere Co.*, 986 F.2d 413, 415 (10th Cir. 1993)) ("this court has determined that once a judgment is obtained, interest
 27 thereon is mandatory without regard to the elements of which that judgment is composed").

28 ²⁰ These topics were exhaustively addressed in the previous requests for bonds as to Objectors Gaona, Maddox and
 29 Swift. For the sake of brevity the applicable law and argument included in those submissions are incorporated herein
 by reference.

²¹ There is objective evidence in the record here that this Court and the Parties did not viscerally respond in a
 2 negative way and then seek a punitive bond to deter objections. It is a matter of record that another objection was
 3 embraced by all concerned. *See* Docket no. 379, Clifford Ferguson Objection to Settlement, September 22, 2009.

1 Robert Bonsignore in Support of Plaintiff's Motion for Appeal Bond for Objector
 2 Fatima Andrews at Paragraph 24.

3 5.) \$401,831.00 as the estimated interest lost on the floor of \$65 million guaranteed
 4 payment assuming median time on appeal of 19 months. *See* Declaration of John
 5 Ward, Ph.D., at ¶ 7, Table 1. *See also* Declaration of Wendy Lascher, J.D., at ¶ 19,
 6 Exhibits III and IV respectively to Plaintiff's Motion for Appeal Bond for Objector
 Fatima Andrews.

7 The total requested is \$608,972.28.

8 **A. The Amount of the Requested Bond is Appropriate**

9 The Court should exercise its discretion to protect the Class. Only by requiring Objector
 10 Andrews to post an appellate cost bond in the amount of \$608,972.28 will the Class be certain of
 11 being made whole following the denial of the Andrews appeal. The amount of the requested
 12 bond is appropriate when the facts specific to this appeal are reasonably reviewed under the
 13 applicable Ninth Circuit law and public policy.

14 **1. Permitted Taxable Costs Include Preparation and Transmission of the
 15 Record, Reporter's Transcript, and the Fee for Filing Notice to Class
 16 Members of the Appeal**

17 The Ninth Circuit has held that FRAP 7 includes, but is not limited to, "all costs properly
 18 awardable at the conclusion of the appeal," as FRAP 39(e) does not contain "any expression to
 19 the contrary." *Azizian*, 499 F.3d at 958.

20 The Ninth Circuit has further made clear that, "[T]he costs identified in Rule 39(e) are
 21 among, but not necessarily the only, costs available on appeal [for purposes of Rule 7]." *Azizian*,
 22 499 F.3d at 958. This straight forward point of law may be of importance in addressing
 23 Andrews' anticipated position.²² Clearly, the imposition of the bond is a matter of this Court's
 24 discretion and will be determined after consideration of all the relevant circumstances.

27
 28 ²² Counsel for Objector Andrews represents another Objector and filed an Opposition to a bond request which can
 be reasonably taken as indicative of what may be expected here. *See* Docket no 583, Response to Motion for Bond
 Pursuant to FRAP 7 (hereafter, "Pentz Response"), January 26, 2010. In opposing Plaintiffs Request for an
 Appellate Bond as to Objector Stephanie Swift, Andrews' Counsel offered an inaccurate and self serving opinion of

1 The amounts requested as appropriate are as follows:

2 **a. Preparation and Transmission of the Record**

3 Plaintiffs request \$5,538.20 as the cost for the preparation and transmission of the
 4 record, specifically, the costs of printing and copying briefs and other submissions. *See*
 5 Declaration of Co-Lead Counsel Robert Bonsignore in Support of Plaintiff's Motion for Appeal
 6 Bond for Objector Fatima Andrews at Paragraph 25. This amount is properly included within
 7 the requested bond amount and may be awarded in the discretion of this Court.
 8

9 **b. Cost for Reporter's Transcripts**

10 Plaintiffs request \$1,403.90 as the cost for reporter's transcripts. *See* Declaration of
 11 Robert Bonsignore in Support of Plaintiff's Motion for Appeal Bond for Objector Fatima
 12 Andrews at Paragraph 22. This amount is properly included within the requested bond amount
 13 and may be awarded in the discretion of this Court.
 14

15 **2. Administrative Costs**

16 As a direct result of this appeal, class members will suffer additional ascertainable
 17 economic loss during the pendency of this frivolous appeal. As specifically enumerated below,
 18 the Class will incur the future costs over the next two years²³ that are established in an un-
 19 rebutted opinion offered by Rust Consulting, Inc., (hereafter, "Rust Consulting" or "Rust") *See*
 20

21
 22
 23 the actual holding in the *Azizian* case. *Azizian v. Federated Dept. Stores*, 499 F.3d 950 (9th Cir. 2007). Attorney
 24 Pentz's take on *Azizian* is entirely contrary to the public policy supporting the imposition of Appellate Bonds and is
 25 an unreasonable reading of the case. He suggests that the *Azizian* holding was intended to eviscerate the traditional
 26 public policy concerns including the rights of the class to reasonable protection against future frivolously incurred
 27 Appellate costs, as well as the discretion allowed to this Court in when assessing an Appellate bond. The Class
 28 requests this Court to take note that this is at least the second time that Counsel has inaccurately cited Ninth Circuit
 law. The first being the incorrect conclusion they offered relating to the award of fees being measured against the
 "ceiling." *See* Pentz response at 1-2. That incorrect conclusion ran contrary to *Williams v. MGM-Pathe
 Communications Co.*, 129 F.3d 1026 (9th Cir. 1997) and *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423
 (2d Cir. 2007) allowing fees against the ceiling.

²³ Plaintiffs offered the opinion of an attorney who specializes in Ninth Circuit Appeals on the reasonably length of time this Court's Opinion finally approving the settlement of MDL 1735 and awarding attorney fees and costs will remain on appeal. It is thus far un-rebutted.

1 Declaration of Amanda Myette, Exhibit V to Plaintiff's Motion for Appeal Bond for Objector
 2 Fatima Andrews. Rust is the Claims Administrator who was appointed by this Court to
 3 administer the settlement and is well known to this Court. *See* Docket #322, Order Preliminarily
 4 Approving Settlement, Approving Form and Manner of Notice, and Scheduling Hearing on
 5 Fairness of Settlement Pursuant to Fed. R. Civ. P. 23(e).

7 Class administration costs are properly included in this Rule 7 bond. In 2005, the
 8 California Central District Court sustained the Plaintiffs' class argument that the Rule 7 bond
 9 should include additional costs for the delay and disruption of administering a settlement of the
 10 case. *In re Broadcom Corp.*, 2005 U.S. Dist. LEXIS 45656, at *9-11. The class successfully
 11 argued in the case, as the Plaintiffs assert here, that the objectors' appeal effectively postponed
 12 distribution of the entire judgment for well over a year. *See Id.* It is again important for this
 13 Court to note that the attorneys for the Objectors failed to acknowledge or cite authority in their
 14 various submissions.

17 Plaintiffs request \$200,000.00 for the administrative fees/costs associated with this
 18 appeal. This amount is properly included within the requested bond amount and may be awarded
 19 here in the discretion of this Court.

20 3. **Deposition Costs**

22 Title 28 U.S.C. § 1920 and Fed. R. Civ. P 54(d) each allows the award of certain
 23 deposition costs, even if those depositions were not used at trial.²⁴ Deposition costs for a special
 24 process server was \$69.18, and a cost for non-appearance at the Deposition was \$130.00. This
 25 totals \$199.18. *See* Declaration of Robert Bonsignore in Support of Plaintiff's Motion for
 26
 27
 28

²⁴ *Washington State Dep't of Transp. v. Washington Nat. Gas Co.*, 59 F.3d 793, 806 (9th Cir. 1995).

1 Appeal Bond for Objector Fatima Andrews at Paragraph 24. This amount is properly included
 2 within the requested bond amount and may be awarded in the discretion of this Court.
 3

4 **4. Interest on the Class Settlement, Attorney's Fees and Costs
 Should be Included in the Bond**

5 Objector Andrews has indicated that this Court limit its consideration of the basis of the
 6 bond to actual costs that will be incurred by the Class. Post-judgment interest is mandatory for
 7 any money judgment pursuant to 28 U.S.C. § 1961.²⁵ When applying the express language of
 8 this statute to the facts of this appeal and the public policy concerns supporting the assessment of
 9 appellate bonds all other considerations that may be raised to oppose this requested assessment
 10 pale in comparison.

12 Post-judgment interest is mandatory for any money judgment pursuant to 28 U.S.C. §
 13 1961.²⁶ There is no question, and there has been no debate, that the purpose of post-judgment
 14 interest is to compensate a successful plaintiff for not being paid during the time of the award
 15 and payment.²⁷ Not only is post-judgment interest assessable upon the judgment, but also
 16 separately upon the attorney's fees²⁸ and costs.²⁹ The interest assessed for each component of
 17 the judgment is calculated from the "date of the entry of the judgment."³⁰

20 In the present case, the interest calculated is supported by expert opinions. Plaintiffs
 21 submitted the Declaration of Economist John Ward, Ph.D. (hereafter, "Dr. Ward"), who used the
 22 required interest rate as set forth in 28 U.S.C. § 1961 and the Declaration of appellate counsel

24 ²⁵ *Donovan v. Sovereign Secur., Ltd.*, 726 F.2d 55, 58 (9th Cir. 1984).

25 ²⁶ *Donovan v. Sovereign Secur., Ltd.*, 726 F.2d 58 (9th Cir. 1984).

27 ²⁷ *Pace Design & Fab. v. Stoughton Composites*, 1997 U.S. App. LEXIS 35780, *2-3 (9th Cir. 1997) (citing
 26 *Donovan*, 726 F.2d at 58); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

28 ²⁸ *Perkins v. Standard Oil Co.*, 487 F.2d 672, 676 (9th Cir. 1973).

27 ²⁹ *Air Separation v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1994) (quoting *Wheeler v. John
 28 Deere Co.*, 986 F.2d 413, 415 (10th Cir. 1993)) ("this court has determined that once a judgment is obtained, interest
 thereon is mandatory without regard to the elements of which that judgment is composed").

³⁰ See 28 U.S.C. § 1961.

1 Wendy Lascher to calculate to the penny the interest that will be lost due to the appeal. Dr.
 2 Ward estimates an interest loss in the amount of \$401,831.00 on the floor of \$65 million,
 3 assuming median time on appeal of 19 months. *See* Declaration of John Ward, Ph.D., Exhibit III
 4 to Motion for Appeal Bond for Objector Fatima Andrews. *See also* Declaration of Wendy
 5 Lascher, J.D., Exhibit IV to Motion for Appeal Bond for Objector Fatima Andrews.

7 The unrebuted proof in the record establishes ascertainable loss that the class will incur
 8 as a result of appeal and lends support to the Plaintiffs' demand that the mandatory statutory
 9 interest be included in the bond. The express provision of statutory interest in 28 U.S.C. § 1961
 10 and the public policy underlying the assessment of bonds supports the exercise of this Court's
 11 discretion the assessment of a bond that protects the Class from this certain loss.

13 Plaintiffs request that the Court assess the sum of \$401,831.00 in interest as part of the
 14 bond. This amount should be properly included with the requested bond amount and may be
 15 awarded in the discretion of this Court.

17 **B. The Court has the Power to Require Andrews to Post a Bond Under the
 18 Circumstances at Bar**

19 **1. Objector Andrews Submitted No Financial Information to
 20 Indicate She is Financially Unable to Post Bond Despite the
 Opportunity to Provide the Court with this Information**

21 The first factor, the appellant's financial ability to post a bond, is satisfied here on the
 22 record before the Court. In *Fleury*, the District Court held the first factor weighs in favor of a
 23 bond if, "there is no indication that plaintiff is financially unable to post bond." *See Fleury*, 2008
 24 U.S. Dist. LEXIS 88166, at *22. Here, like the objector in *Fleury*, Andrews has submitted no
 25 financial information to indicate that she is financially unable to post a bond despite the
 26 opportunity to submit such information when she filed her appeal. *See id.* at *21. Objector
 27 Andrews' counsel has previously suggested that objectors did not have an opportunity to place
 28

1 such information into the record in the Ninth Circuit. *See* Docket 581, Opposition to Motion for
 2 Appeal Bond for Objector Stephanie Swift, January 26, 2010. It is not disputed that Fatima
 3 Andrews and her counsel were on notice of her deposition as well as an order compelling her to
 4 attend, yet they chose not to appear (or seek a protective order). Ms. Andrews also chose not to
 5 attend either hearing. Her failure to place into the record any showing of a financial inability to
 6 post bond clearly weighs in favor of a bond and is of her own doing.³¹ By ignoring an order of
 7 this Court allowing discovery to be taken of her on an expedited basis,³² and an order issued by
 8 Judge Polster³³ compelling her attendance, Ms Andrews cut off the opportunity of Class
 9 Counsel to examine her and test her on this issue. There is no question that she willfully and
 10 knowingly chose not to attend, and in doing so, violated a court order. Service was affected
 11 upon her and there is no debate from her Counsel that they were unaware of Judge Polster's
 12 Order. The record before this Court establishes that Counsel and Andrews failed to appear for
 13 the properly noticed deposition. *See* Attachment D, Deposition Transcript, October 12, 2009.
 14 Pursuant to the express provisions of Federal Rule of Civil Procedure 37, in failing to appear at a
 15 deposition she was ordered to appear at, all reasonable inferences may be indulged against her.
 16
 17 *See* Rule 37 of the Federal Rules of Civil Procedure (hereafter, "Rule 37").

18 Ms Andrews was afforded a further opportunity to create a record on this point during the
 19 Final Approval hearing.³⁴ She further declined to appear or otherwise make arguments in favor
 20 of her objections at the subsequent hearing on fees and incentive awards during the time this
 21
 22

23
 24
 25³¹ *Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, 2008 U.S. Dist. LEXIS 45726, at *7 (E.D. Mich. 2008) ("There is no indication that plaintiff is financially unable to post bond, and thus this factor weighs in favor of a bond").

26
 27³² *See* Docket no. 441, Unopposed Emergency Motion for an Expedited Deposition Schedule, October 5, 2009.

28³³ *See* Attachment B, Ohio Order Granting Complaint for Discovery, October 9, 2009. Both she and her counsels were served, and counsel, too, failed to appear for the deposition. *See also* Attachment C, Subpoena of Fatima Andrews and Return of Process Server Clint Massengale; Attachment D, Deposition Transcript, October 12, 2009.

1 Court set aside for Objectors to speak. Objector Andrews clearly had the duty and opportunity to
 2 supplement the record and her objection at any time prior to the filing of her appeal. It is of her
 3 own doing and/or her counsels that they chose to sit on such rights, instead, opting for the
 4 strategic choice not to take advantage of any one of the many ways she had available to enter
 5 into the record information that arguably would support a contrary finding.

7 Most importantly, even had she affirmatively acted in further support of her objection, on
 8 balance justice would demand that this consideration not overwhelm the countervailing
 9 considerations to and of the Class that support the assessment of a bond. Put in its proper
 10 perspective, this consideration does not eliminate the just need to protect the class and insure
 11 they are made whole. In fact, it pales in comparison.

13 **2. Objector Andrews is Not a Resident in a Ninth Circuit State,
 14 Raising Significant Difficulties in Collecting Appellate Costs**

15 The second factor, the risk that the appellant would not pay the appellee's costs if the
 16 appeal is unsuccessful, also weighs in favor of a bond. In *Fleury*, the District Court held the
 17 second factor weighs in favor of a bond if the Objector does not reside in a state within the
 18 Circuit making it more, "difficult for the Settling parties to collect their costs should they prevail
 19 on appeal." *Id.* at *22.

21 Appellant Andrew is a resident of Ohio, which is not a state within the Ninth Circuit.
 22 Once the appeal fails, Plaintiffs face significantly increased difficulties collecting their costs
 23 because Andrews does not reside in the Ninth Circuit and refuses to follow orders issued in her
 24 locale. Andrews and her counsels have already demonstrated their lack of respect for this Court
 25 and the judicial system. The Plaintiff Class should not be forced to absorb Andrew's appellate
 26

28 ³⁴ In her objection, Objector Andrews advised the Court she intended to appear at the fairness hearing through her

1 costs. If the requested appellate bond is not granted in its entirety, all the Class will receive, in
 2 exchange for the ascertainable economic loss, is the possibility Andrews may vary from her
 3 established pattern and practice of not fulfilling Court related obligations, regardless of how
 4 serious the consequences or how direct the instruction of a Court may be. At best, the chase will
 5 be on, thereby causing even greater expense and loss.

6 Andrews's choice to enter the fray for the express sole purpose of substituting her
 7 judgment for that of this Court and the remainder of the Class was voluntary. *See* Docket no.
 8 581, page 4. Andrews acknowledges on page 1 of her objection that she knowingly opted to
 9 force delay and other costs on the remainder of the class, despite other alternatives that would
 10 not have imposed the economic loss on others.³⁵ *See* Attachment A, Docket No. 385, Andrews'
 11 Objection at 1. Should the Appeal be dismissed, there should be no question that Class members
 12 will seek to be compensated for every penny of their ascertainable economic loss that they are
 13 entitled to from Fatima Andrews. Absent the assessment of a bond, this process will be lengthy
 14 and uncertain. All Americans are in rocky financial times. Because of that consideration, and
 15 others, there is no guarantee that Andrews' ability to earn or liquidate assets as possessed now
 16 will be available to pay the funds that will be due the Class in the event that the appeal fails.
 17

18 Objector Andrews' lack of residence in the Ninth Circuit and the other considerations set
 19 forth herein, coupled with the clear intent of the applicable public policy, weigh in favor of the
 20 assessment of the appeal bond requested of Andrews. In contrast, no considerations favor the
 21 certain new round of litigation that would ensue following Andrews' unsuccessful appeal,
 22 thereby pressing the collection of the economic loss due the class. It is certainly more prudent,
 23

24
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 26
 27
 28 counsel.

³⁵ Andrews writes "... No money has been paid into the escrow".

1 under the totality of the circumstances presented, to extend to the Appellee Class the protections
 2 offered by law through the assessment of the reasonable bond.

3 **3. Objector Andrews' Appeal is Not Likely to Succeed**

4 The third factor, the merits of the appeal, also weighs in favor of a bond. In *Fleury*, the
 5 District Court held the third factor weighs in favor of a bond if, after the Court has considered
 6 each of the objections, it finds them meritless and not likely to succeed on the merits of her
 7 appeal. *See id.* at *23. In *Fleury*, the court noted when final approval was granted, the objector's
 8 objections were reviewed, found meritless and final approval was granted. *Id.* at *9, 23. The
 9 court in *Fleury* held that the lack of likelihood of success on the objections' merits favored a
 10 bond requirement. *Id.* at 23. The lack of likelihood of success on the merits of the Andrews
 11 objection as set forth herein favors a bond requirement.

14 Here, while the undersigned Plaintiffs believe the third factor weighs in favor of a bond,
 15 we expressly request that the Court *not* consider any potential bad faith or frivolous conduct as a
 16 consideration for the imposition of the appeal bond or including within the amount of the bond
 17 any fees, costs or expenses for such conduct. *See* Docket no. 561 dated January 8, 2010. While
 18 the *Fleury* court did consider the merits of the objections, it refrained from considering any of
 19 the objections' potential bad faith in consideration of the *Azizian* holding. *Id.* at 23-24, fn. 3.

21 It is very important for this Court to note that the undersigned Plaintiffs³⁶ expressly
 22 withhold the offering of any included evidence of bad faith in advancing a request for a bond as
 23 to any and all objectors, including Fatima Andrews.³⁷ Any such reference is unintended for that

25
 26 ³⁶ Carolyn Beasley, Carol LaPlant, and Robert Mills have refused to join with the undersigned Plaintiffs. Dirk
 27 Ravenholt has recently represented his support of the requests for bonds on the Objectors and expressed a desire to
 be included on related pleadings and until we are advised to the contrary we will honor his request.

28 ³⁷ We are aware of the Ninth Circuit Court of Appeals opinion in *Azizian* and have consciously acted to avoid
 advancing, in support of this bond, arguments that run counter to its holding. *See Azizian* at 961. ("We agree with
 the D.C. Circuit that the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals,

1 purpose of assessing a bond and/or is merely superfluous to this motion. Plaintiffs' advance that
 2 such references can and will be used in support of a later Rule 38 request at the Appellate Court
 3 level and call upon Objectors counsel to correct the record as needed to address that intent. Any
 4 failure to so act is taken as a waiver.

5 During two separate hearings, this Court established that it had scrutinized the related
 6 filings and attachments, including each objection, and weighed the facts and law prior to coming
 7 to its own conclusions. In fact, the Court carefully went through the required evaluative factors
 8 and made findings supporting its ultimate approval of the Settlement and the award of fees and
 9 incentive awards.³⁸ *See* Docket no. 491, Order, 9-13, November 2, 2009 ("hereafter, Final
 10 Approval Order"). *See also* Docket no. 482, Transcript of Final Fairness Hearing, October 19,
 11 2009; Docket no. 520, Hearing on Attorney Fees and Incentive Awards, November 20, 2009.
 12 Andrews, through counsel, was provided with a full opportunity to support her position through
 13 the objection process. She failed to avail herself of any of these opportunities; insuring that her
 14 objection and appeal will ultimately fail.

15 Following the filing of her objection, Fatima Andrews and her counsel made the
 16 affirmative choice not to participate in any step in the Final Approval process. While the fact

21 which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or
 22 impose sanctions including attorney's fees under Rule 38.") *See also In re Am. President Lines*, 779 F.2d 714, 717
 23 (D.C. Circuit 1985). Allowing district courts to impose high Rule 7 bonds on where the appeals *might* be found
 24 frivolous risks "impermissibly encumber[ing]" appellants' right to appeal and "effectively preempt[ing] this court's
 25 prerogative" to make its own frivolousness determination. *Id.* at 717, 718; *See also Adsani v. Miller*, 139 F.3d 67,
 26 79 (2nd Cir. 1998) ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.")
 27 (quoting *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974)). Any overlap of argument or the
 28 presentation of facts not favored by that opinion is not an intentional attempt to circumvent that ruling. However,
 should this bond be appealed we do intend to request the Appeals Court to revisit and refine that decision to reflect
 the realities of present day class action practice and the damage that professional objectors inflict on our system of
 Civil Justice.

³⁸ As previously detailed, Fatima Andrews and her counsels were welcome to supplement her original objection at
 any time, but did not do so even after the circumstances that existed at the time of her original September 24, 2009
 filing materially changed. Andrews was compelled to appear at deposition, but she and her counsel knowingly and

1 that Andrews willfully and knowingly chose to waive several opportunities to supplement her
 2 original filing is noteworthy – it is the actual record and the woefully inadequate content of her
 3 objection that makes its ultimate failure certain here – a fact which did not escape the attention of
 4 this Court in making its judgment on Final Approval.

5 Andrews is bound by and limited to the contents of her objection and appeal. Andrews'
 6 failure to consider, address or rebut a single fact, argument or finding that was made part of the
 7 record, after the filing of her original appeal, is fatal. Relying on a submission that predates *all*
 8 of the related briefing and evidence, as well as *all* of the findings this Court made in support of
 9 the Order Andrews is appealing, is frivolous. Andrews' earlier reference to the fact that "there is
 11 a body of federal jurisprudence regarding attorney's fees that shows reasonable people often
 12 differ" lends no support what so ever, because, in addition to supporting the exercise of
 13 discretion by this Court in awarding fees based on the many factors it made findings on, this
 14 vague reference fails to properly identify and adequately support the level of error that would
 15 result in or require an Appellate Court reversing this Court's discretionary award of fees. *See*
 16 Docket no. 556, Response to Motion for Bond Imposition of Appeal Bond filed by Objectors
 17 Gaona, Swift, Andrews, and Maddox and Their Attorneys and Seeking Any Other Appropriate
 18 Relief to Protect the Class, January 4, 2010.

21 While vague legal references are the best Objector Andrews offers to support reversal of
 22 this Court, it is noteworthy that the scant applicable legal authority she offers includes a
 24 completely inapposite citation to Ninth Circuit law i.e. that attorney fees should have been based
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28 willfully made the choice not to appear. She and her counsel were also invited to attend and contribute to the Final
 Approval hearing, and were allotted time by this Court but did not.

1 on the floor.³⁹ The Ninth Circuit has expressly accepted floor/ceiling settlements. *See also*
 2 *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997); *Masters v.*
 3 *Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007). It also must be pointed out that
 4 this argument, logic and math utilized by Andrews is factually inapplicable in the instant
 5 litigation. *See* Docket no. 507-1, Declaration of Prof. Silver, November 17, 2009. The intent of
 6 Andrews' baseless appeal is obvious, and her claims of error are both procedurally and
 7 substantively without merit. *Dewitt v. Western Pacific*, 710 F.2d 1448, 1451 (9th Cir. 1983).

8 For these and the reasons that follow, the third *Fleury* factor is reasonably met here.⁴⁰

9

10 a. **After Extensive Review and Consideration by this Court, the**
 11 **Settlement Amount was Found Fair, Reasonable and Adequate**
 12 **and was both Preliminarily and Finally Approved.**

13 Andrews' first objection, that the guaranteed "Floor" amount of \$65,000,000 in the
 14 Settlement Agreement was inadequate for 29 states, has been waived because it was not included
 15 in her appeal. Moreover, this argument is inapplicable to the facts of this case and the fee award
 16 was otherwise supported in this Court's related findings. Therefore, Andrews' Objection to the
 17 guaranteed Floor is frivolous, unsupported, not likely to succeed, and warrants the assessment of
 18 the reasonable bond requested.

19

20 b. **The Fee Award was Found Fair and Appropriate Under Ninth**
 21 **Circuit Law and Expert Opinions Support Using the**
 22 **Settlement Ceiling, Not the Floor, as an Appropriate Figure to**
 23 **Base Fees on.**

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25 ³⁹ The reference to filings by Ms. Beasley and Mr. Mills contain only their opinions. They are not adopted or
 26 supported by the remainder of class counsel and fare no better than the inapposite law cited.

27 ⁴⁰ It is the goal of Professional Objectors to have their objection accepted at the Appellate level and to be placed in
 28 the system for review because this brings with them the delay they seek as leverage to extract payments from
 Plaintiffs counsels. In the long run, whether they win is not important as to individual cases because they play the
 averages and losing appeals is a cost of doing business. Over time, it has become an established fact that each time
 they have docketed a colorable appeal the odds are with them that they will receive a payment in exchange for
 dropping the appeal.

1 Andrews' second objection, that attorney's fees should not exceed 25% of the Floor is
 2 also unfounded and unsupported and has been exhaustively dismantled above. Several
 3 arguments should be added to the mix.
 4

5 First, it is elementary that the Ninth Circuit recognizes the common fund doctrine
 6 approach used in this Settlement. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271
 7 (9th Cir 1989); *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). *See also Boeing Co. v.*
 8 *Van Gemert*, 444 U.S. 472, 478 (1980); *Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421
 9 U.S. 240 (1975). A percentage of the recovery approach, the approach used in this Settlement, is
 10 the predominant method for determining attorney's fees in the Ninth Circuit. *See Vizcaino v.*
 11 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d
 12 1370, 1376-77 (9th Cir. 1993); *Paul, Johnson*, 886 F.2d at 272; *Six Mexican Farm Workers v.*
 13 *Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). This Court finally approved the
 14 attorney's fees and found them fair and appropriate under Ninth Circuit Law. *See* Final
 15 Approval Order at 10-13. It did so after careful analysis and review of the required factors.
 16

18 Further, the relevant factors of this case justified an award of 33.333% in this case
 19 because: 1) the result achieved was significant; 2) the litigation was complex and required a high
 20 level of skill; 3) the quality of the work performed was high; 4) the litigation carried significant
 21 risks; 5) the fee was contingent and precluded other employment; 6) similar percentages were
 22 awarded in other complex cases; and 7) all Plaintiffs, Class counsel, Wal-Mart and Class reaction
 23 supported the award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Rodriguez v. West*
 24 *Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Vizcaino*, 290 F.3d at 1048-1059; *Hanlon*,
 25 150 F.3d at 1027; *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997); *In re Pacific Enter. Sec.*
 26 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995); and *In re Lorazepam & Clorazepate Antitrust Litig.*,
 27
 28

1 2003 WL 22037741, at *9 (D.D.C. 2003).

2 The offer of proof that the Court expressly relied on is overwhelming. *See* Complaint,
 3 Docket nos. 53, 56, 138, 154, 158, 289, 300-301; Class Certification, Docket nos. 89-94, 203-
 4 220, 231, 248, 249, 323; Preliminary Approval, Docket nos. 302-322; Final Approval, Docket
 5 nos. 425-438, 486. Failing to address these pleadings in any way, Andrews guaranteed the
 6 failure of her appeal.

7
 8 On November 2, 2009, after an additional hearing, and taking into consideration a second
 9 round of briefing, as well as more evidence that included the additional expert opinion of the
 10 preeminent authority on attorney fees in American class actions, Prof. Charles Silver (hereafter,
 11 "Professor Silver"), the Court, subsequently approved the award of attorney's fees and incentive
 12 payments for the class representatives.⁴¹ *See* November 20, 2009 Minutes, Docket no. 520. *See*
 13 also Docket no. 507, Attachment A to Supplement Declaration of Robert J. Bonsignore in
 14 Support of Motion for Award of Attorneys Fees and Expenses and Incentive Awards Relating to
 15 Proposed Settlement with Defendant Wal-Mart, Expert Report of Professor Charles Silver
 16 Concerning the Bearing of the Claim Rate on the Fee Award (hereafter, "Silver Declaration"),
 17 November 17, 2009. A lodestar cross-check analysis also supported the reasonableness of a
 18 33.333% award here. *See Vizcaino*, 290 F.3d at 1050-51 & n.5. Attorneys in common fund
 19 cases are ordinarily also reimbursed for reasonable out-of-pocket expenses and the
 20 reimbursement of expenses here was appropriate. *See Lorazepam*, 2003 WL 22037741, at *10;
 21 *In re Airline Ticket Comm'r Antitrust Litig.*, 953 F. Supp. 280, 286 (D. Minn. 1997); *In re*
 22 *Catfish Antitrust Litig.*, 939 F.Supp. 493, 503 (N.D. Miss. 1996); *In re SmithKline Beecham*
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⁴¹ Objector Andrews, through counsel, was noticed, was also reasonably notified of the subsequent hearing and chose not to attend or offer any supplement to her original Objection.

1 *Corp. Sec. Litig.*, 751 F.Sup. 525, 534 (E.D. Pa. 1990). Here, the multiplier afforded Plaintiffs'
 2 counsels was modest.

3 Second, the application of Ninth Circuit law establishing that attorney's fees are
 4 calculated from the ceiling was particularly appropriate under this settlement. *See* Silver
 5 Declaration at 8-11. *See also* Declaration of William B. Rubenstein in Support of Settlement
 6 Approval and Fee Petition at 3, 24-32 (hereafter, Rubenstein Declaration), Docket no. 417,
 7 October 10, 2009. It is clear that, in proclaiming at the outset that the attorney's fees were
 8 incorrectly calculated as a matter of law, Andrews, through counsel, has failed to carry out even
 9 the most rudimentary factual and legal research. As described above, the early filing of the
 10 objection, coupled with the failure to supplement after either the briefing or findings and Order,
 11 rules out any possibility that Andrews took into account why the fee was just and reasonable.

12 The record establishes that Andrews offered no facts or relevant/original argument in
 13 support of her quest to reverse well-established Ninth Circuit authority or meaningfully this
 14 Court's well supported and reasoned discretionary award of fees. That Andrews failed to even
 15 acknowledge the evidence and arguments offered in support, including the common opinion of
 16 two highly respected legal authorities, is merely "more sauce on an already cooked goose".⁴²

17 In proclaiming that such a settlement and/or award of attorney fees is wrong and should
 18 be reversed,⁴³ Andrews simply and boldly seeks to substitute her judgment for that of this Court.
 19 Andrews "opinion" also runs contrary to the expert opinions properly admitted into evidence by
 20 the Plaintiffs. Notably, while Plaintiffs offered opinions on fees through experts, Andrews
 21 offered only her general position as a lay witness. In the first place, it is the contention of the

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 27 ⁴² The contents of the opinions of Prof. Silver and Prof. Rubenstein speak for themselves, and a gratuitous recap is
 28 not necessary.

1 class that Andrews is not qualified to render an opinion on fees, and because she offers no
 2 supporting arguments, expert opinions, affidavits or facts substantiated by legitimate means -
 3 only her own unsupported conclusions - her objection is otherwise meritless and the failed
 4 outcome of her appeal is obvious.

5 In essence, Andrews seeks to rewrite Ninth Circuit law without providing any reasoning
 6 and/or any basis in fact or legal principle. Andrews' inability to address the twice failed attempt
 7 of other Ohio class members to certify the litigation or address the anticipated risks and costs of
 8 advancing the case anew, this objector fails to offer even a hint as to how the best interests of the
 9 class are served through her objection. She also revealed an astounding level of ignorance on
 10 matters that are highly relevant to any sound evaluation of the fairness and reasonableness of the
 11 Order(s) in issue.⁴⁴

12 Therefore, Andrews' Objection is unsupported, not likely to succeed, and presents no
 13 obstacle to the assessment of the reasonable bond requested.

14

15 **4. Whether Objector Andrews's Appeal Shows Bad Faith and Vexatious
 16 Conduct Need Not Be Considered**

17 A fourth possible factor, whether the appellant has shown bad faith or vexatious conduct,
 18 would weigh in favor of a bond. However, even though Plaintiffs' believe that the appellants
 19 have acted in bad faith, demonstrated vexatious conduct, and that their counsels are professional
 20 objectors, this factor is not discussed in depth here or advanced on the present record as a basis
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26 ⁴³ The Ninth Circuit has expressly accepted floor/ceiling settlements. *See* Rubenstein Declaration at ¶¶33-35. *See*
 27 *also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997); *Masters v. Wilhelmina Model*
Agency, Inc., 473 F.3d 423 (2d Cir. 2007).

28 ⁴⁴ Although we advance that Andrews waived the right to argue anything other than attorney fees on Appeal the
 logic and argument advanced in the earlier objections relating to the merits of the settlement have been incorporated
 herein by reference.

1 for the request for a bond because of the *Azizian* holding.⁴⁵ The analyses of the first three factors
 2 are sufficient to conclude that a bond should be imposed upon Objector Andrews.⁴⁶

3 Moreover, Andrews's Objection is entirely inadequate. When weighed against the burden
 4 of proof required by the class to set aside the District Court's findings, Andrews's flimsy offering
 5 does not support the denial of Plaintiffs' request for a bond or demonstrate that it is unreasonable
 6 under the circumstances. For all the reasons discussed herein, Andrews is not likely to succeed
 7 on the merits of her appeal. In any event, the merits of Andrews' appeal weigh in favor of the
 8 imposition a bond because nothing contained therein guarantees the likelihood of success or that,
 9 in the event she loses, the Plaintiffs will recover their costs.

10 The absence any factual or legal support for the conclusions she offered through her
 11 counsel, John J. Pentz, Esq. (hereafter, "Pentz"), comes as no surprise. Pentz is a self-described
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16 ⁴⁵ The concerns of class counsel as to Beasley-Burton continue to increase. Beasley-Burton has again filed a
 17 document without the advance knowledge, advice or consent of other class counsel, this time purporting to offer a
 18 Reply on behalf of the undersigned. *See* Docket no. 584, Reply Brief of Co-Lead Counsel Carolyn Beasley Burton
 19 to Objector Stephanie Swift's Opposition to Motion for Appeal Bond, February 4, 2010. The contents of the
 20 Beasley Burton filing run counter to the strategy and understanding of the law advanced by the undersigned counsels
 21 and in fact undermine our strategy. Separate filings will more fully address that unauthorized filing. As this Court is
 22 aware, the undersigned counsel previously objected to content in Beasley-Burton's December 18th, 2009
 23 memorandum, Plaintiffs' Memorandum in Support of Motion to Require Objectors Gaona, Swift, Andrews, and
 24 Maddox and Their Attorneys to Post Appeal Bonds, and Seeking Any Other Appropriate Relief to Protect the Class
 25 (hereafter, "Beasley-Burton Bond Memo"). *See* Docket no. 536, Beasley-Burton Bond Memo December 18, 2009.
 26 In that submission, the vexatious conduct of professional objector Pentz was relied upon as a reason to assess a
 27 bond. The issue of the vexatious conduct of the Professional Objectors is not relied upon herein because it is
 28 recognized as being an impermissible basis for District Court to rely in when assessing a bond.

29 ⁴⁶ The 9th Circuit does not favor review and consideration of bad faith or vexatious conduct by the District Courts
 30 because, "Allowing districts court to impose high Rule 7 bonds on where the appeals might be found frivolous risks
 31 impermissibly encumber[ing] appellants' right to appeal and effectively preempt[ing] this court's prerogative to
 32 make its own frivolousness determination." *Azizian*, 499 F.3d at 961. Nonetheless, we summarize what other
 33 circuits would have considered because in the event this bond is appealed, we will ask the Appeals Court to revisit
 34 its holdings in the 2007 *Azizian* case. In *Fleury*, 2008 U.S. Dist. LEXIS 88166, at *19, the District Court found
 35 evidence that Objector's counsel, had at least one appeal already found to be frivolous by another court and also that
 36 the Objector's lack of understanding of the basis of the appeal was "troubling" but refrained making a finding
 37 because of the recent case *Azizian v. Federated Department Stores, Inc.* There is no question that Objector Andrews
 38 is represented by a Professional Objector. Pentz is a lawyer who is well known for posing objections to class
 39 settlements in an attempt to extract a payment from the class members. *See* fn. 7 above. The appellate courts in
 40 reviewing the appeal of the instant settlement is entitled to a full record when passing on a Rule 38 request
 41 especially in light of the extraordinary burden they place upon Appellee's seeking to enforce that rule of law.

1 "Professional Objector" with a jaded history.⁴⁷ More importantly under the limitations
 2 presented by the four corners of her objection and appeal Andrews' legal arguments run contrary
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5 ⁴⁷ Boiled to their essence, Professional Objectors are most often described as and compared to extortionists or other
 6 thugs who extract cash through wrongful means. The reality is that what Professional Objectors seek in exchange
 7 for simply dropping their objections/appeals is to be paid off. Seldom if ever does the class receive a benefit. Pentz
 8 has served as a Professional Objector in at least 39 cases. *See Davis v. UST*, No. 17305 II, Circuit Court for
 9 Jefferson County, TN; *Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005); *In re Lucent Technologies, Inc.*
 10 *Securities Litigation*, 327 F. Supp. 2d 426 (D.N.J. 2004); *In re Relafen Antitrust Litigation*, 231 F.R.D. 52 (D. Mass.
 11 2005); *Spark v. MBNA Corp.*, 289 F. Supp.2d 510 (D. Del. 2003); *In re Warfarin Sodium Antitrust Litigation*, 212
 12 F.R.D. 231 (D. Del. 2002); *In re Charter Communications, Inc.*, MDL 1506, 02cv1186 (E.D. Mo. 2005); *Curry v.*
 13 *Fairbanks Capital Corp.*, 03cv10895 (D. Mass. 2004); *Azizian v. Federated Department Stores, Inc.*, 03cv3359
 14 (N.D. Cal. 2005); *In re Serzone Products Liability Litigation*, MDL 1447 (S.D.W.V. 2005); *In re Visa*
 15 *Check/Mastermoney Antitrust Litigation*, 96cv5238 (E.D.N.Y. 2004); *In re Compact Disc Minimum Advised Price*
 16 *Antitrust Litigation*, MDL 1361 (D. Me. 2003); *Tenuto v. Transworld Systems, Inc.*, 2002 WL 188569 (E.D. Pa.); *In*
 17 *Re Allstate Fair Credit Reporting Acti Litigation*, (M.D. Tenn.); *Lipuma v. American Express*, 04cv20314 (S.D.
 18 Fla.); *Clark v. Experian Information Solutions, Inc.*, 2004 U.S. Dist. LEXIS 28324 (D.S.C.); *Schwartz v. Citibank*,
 19 00cv75 (C.D. Cal.); *Mangone v. First USA Bank*, 206 F.R.D. 222 (S.D. Ill. 2001); *In re PayPal Litigation*, 2004
 20 U.S. Dist. LEXIS 22470 (N.D. Cal.); *Benacquisto v. American Express*, 00cv1980, (D. Mn); *In re Disposable*
 21 *Contact Lens Antitrust Litigation*, MDL 1030 (M.D. Fla.); *Galanti v. The Goodyear Tire & Rubber Company*,
 22 03cv209 (D.N.J.); *In re NE Mutual Life MDL*, et al., 96cv11534 (D. Mass.); *In Re Daimlerchrysler*, et al., 00cv993
 23 (D. Del.); *In re Rite Aid Corp.*, MDL 1360 (E.D. Pa.); *Schwartz v. Dallas Cowboys Football*, 97cv5184 (E.D. Pa.);
 24 *Zawikowski v. Beneficial National Bank*, 98cv2178 (N.D. Ill.); *Synfuel Technologies, LLC v. Airborne Express, Inc.*,
 25 02cv324 (S.D. Ill.); *Meyenburg v. Exxon Mobil Corp.*, 05cv15; *In re: MCI-Subscriber Telephone Rates Ligitaiion*,
 26 MDL 1275, 99cv1275 (S.D. Ill.); *Lindmark v. American Express*, 00cv8658 (C.D. Cal.); *Roasted v. First USA Bank*,
 27 97cv1482 (W.D. Wash.); *In re: Managed Care*, et al., MDL 1334 (S.D. Fla.); *Varacallo v. Massachusetts Mutual*
 28 *Life Insurance Company*, 04cv2702 (D.N.J.); *Landreneau v. Fleet Bank (RI) National Ass'n*, 01cv26 (M.D. La.);
Barnes v. FleetBoston Financial Corp., 2006 U.S. Dist. LEXIS 71072 (D. Mass.); *In re Royal Ahold N.V. Securities*
& ERISA Litigation, 461 F. Supp. 2d 383 (D. Md. 2006); *Lachance v. United States Smokeless Tobacco*, no. 2006-
 2007 564. (N.H. 2006).

19 Of these cases, the majority were overruled or denied by the court. Some examples include *Taubenfeld v.*
 20 *Aon Corp.*, where the court overruled Pentz's client's objection. "The objector's quarrel with the portion of lead
 21 counsel's award pertaining to reimbursement for expenses barely warrants comment." *Taubenfeld* at 600. Also, in
 22 *In re Lucent Technologies, Inc. Securities Litigation*, where the court ruled against the objectors and found that
 23 Pentz's client's objection had misstatements of facts and was misleading. *Id.* In *Spark v. MBNA Corp.*, the Court
 24 ruled against Pentz's client's objection and found the objector's, "opposition to class counsel's fee petition appears to
 25 be nothing more than an attempt to receive attorneys' fees." *Id.* In *In re Warfarin Sodium Antitrust Litigation*, the
 26 Court overruled Pentz's specific objections and found that Pentz's client seemed to have a misunderstanding of the
 27 Settlement.

28 In *In re Compact Disc Minimum Advised Price Antitrust Litigation*, the Judge called Pentz's obejction,
 29 "groundless," called Pentz a "professional objector" and required Pentz to post an appeal bond, which he never
 ended up posting. The district court required the objector, who was represented by Pentz, to post a bond because
 that appeal "might be frivolous," and because imposition of sanctions on appeal pursuant to Rule 38, was "a real
 probability." The court specifically concluded that a bond for "damages resulting from delay or disruption of
 settlement administration caused by a frivolous appeal may be included in a Rule 7 bond." *Id.*, *5. Mr. Pentz and his
 client voluntarily dismissed their appeal thirteen days later. (MDL 1361 Docket item number 325.) The Court in
 this case specifically noted, "I have previously noted that Attorney Pentz...filed a groundless objection following
 the fairness hearing, ... and he appears to be a repeat objector in class action cases. *See, e.g., Spark v. MBNA Corp.*,
 48 Fed. Appx. 385, 386 (3d Cir. 2002) (listing Mr. Pentz, from The Objectors Group, as counsel for objectors);
Tenuto v. Transworld Sys., 2002 U.S. Dist. LEXIS 1764, 2002 WL 188569 (E.D. Pa. Jan. 31, 2002), at *2 (same)."
Id. at 6.

1 to the Ninth Circuit law cited in support of the award of fees without any effort or content
 2 devoted to explaining why.

3 Therefore, the weighing of the *Fleury* factors demonstrates that the posting of a bond
 4 under FRAP 7 is necessary and appropriate here.

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 7 In *In re Disposable Contact Lens Antitrust Litigation*, the Court ruled against Pentz's client, found that
 8 counsel for the objector, Pentz, never even read the case file in its entirety and that the objector's ignorance would
 9 prejudice the parties if allowed to intervene. In *Barnes v. FleetBoston Financial Corp*, the Court ruled against a
 10 portion of the objection and found for a bond for the remainder of the objections. Further, the Court found objector,
 11 "Feldman and her attorney, John Pentz (who is also her son-in-law) are professional objectors..." *Id.* Finally, in *In
 re Royal Ahold N.V. Securities & ERISA Litigation*, the Court overruled Pentz's objection and further held, "Pentz is
 12 a professional and generally unsuccessful objector..." Also, "In summary, the Pentz/Tsai objection was not well
 13 reasoned and was not helpful." *Id.*

14 Undoubtedly, Pentz's "objections and appeals are not truly made to advance the interest of the class
 15 members. Pentz has admitted that "the bulk of his income does not come from court-awarded fees," and that the
 16 payments he receives from the parties to drop his objections "usually dwarf court awards." "So how does Pentz
 17 make a living? He refuses to generalize, arguing that every case is unique. But he will acknowledge that the bulk of
 18 his income does not come from court-awarded fees...[T]hat kind of fee is the exception rather than the rule, Pentz
 19 says. Instead, objectors make most of their money when class counsel pay them to drop their objections. Pentz
 20 concedes that payments from class counsel usually dwarf court awards. Joe Whatley of Birmingham-based Whatley
 21 Drake, who faced off with Pentz in three different cases, says he has always paid Pentz to drop objections without
 22 making changes to the settlement. 'It's like having to pay a tax,' Whatley says." Lisa Lerer, "Fringe Player, The
 23 Objector, John Pentz, Class Action Fairness Group, Sudbury, Massachusetts," *Litigation* 2004, a supplement to *The
 24 American Lawyer & Corporate Counsel*, Oct. 1, 2004. Pentz does not dispute that he is a Professional Objector and
 25 even if he did there is ample evidence that he is and that his objections are not received favorably by the Courts.

26 In *Joyce Beasley v. Prudential General Insurance*, Opinion and Order Granting Plaintiffs Motion to Strike
 27 the Notice of Intent to Appear, Objection to Class Action Settlement and Request for Attorneys' Fees and Motion to
 28 Intervene of Objector Thomas and Marilyn Bell, Circuit Court of Miller County, Arkansas, June 9th, 2006
 (hereafter, Arkansas Opinion."), the Court found that Pentz's, "practice appears devoted to filing objections in class
 1 action settlements. See Attachment G, Arkansas Opinion. Pentz appears to be a repeat objector in class action cases
 2 which is sometimes referred to as a professional objector." *Id.* at 5 (citation omitted) The Arkansas Opinion
 3 reviewed *In re Compact Disc*, where the Court imposed an appeal bond against Pentz because Pentz's appeal
 4 appeared frivolous and filed a "groundless objection." *Id.* The Arkansas Opinion further noted that at no point did
 5 Pentz reveal to the Court in his Affidavit that a federal district court had found him to be a repeat objector who filed
 6 a groundless objection. *Id.* Pentz's affidavit falsely stated that he was "never sanctioned or disciplined by any
 7 lawyer disciplinary agency in any jurisdiction." *Id.* at 12. This Court further found that Pentz engaged in the
 8 unlicensed and unauthorized practice of law in Arkansas when he filed the Objectors' Pleadings without first
 9 submitting the required *pro hac vice* materials. *Id.* at 16. The court found that because, "Pentz specializes in
 10 objecting to Class Settlements. Because of his chosen vocation, Pentz should be familiar with the basic process of
 11 searching the case law of various states." *Id.* Also, the Court noted, "Given that many if not most, sanction,
 12 contempt and Rule 11 orders are not published in publicly available databases, this Court has significant questions
 13 whether Pentz is concealing additional information relevant to any motion for admission *pro hac vice* he may file in
 14 the future." *Id.* at 13. Additionally, the Court found that it was Pentz's "conduct in and of itself that renders
 15 Objectors' Pleadings null and void." *Id.* at 16. The Court found that because Pentz's Pleadings were found to be null
 16 and void, the Objectors lost their right to formally assert their objections. *Id.* Finally, the Court found that Pentz
 17 operates under the trade name of "Class Action Fairness Group," a name that is similar to the federal Class Action
 18 Fairness Act, however, "Pentz neither appears to have a relationship with any governmental agency charged with
 19 enforcing the Class Action Fairness Act and appears to represent a public or charitable legal services group. Pentz
 20 has not rebutted that he operates on a for-profit basis." *Id.* at 8.

CONCLUSION

This Court's finding that the Plaintiffs' request for the assessment of a bond is reasonable and in the appropriate amount is not dependent upon any one consideration. Rather, it will be arrived at after reviewing and considering the totality of the facts and circumstances attendant to this request, in accordance with the legal nuances controlling in the Ninth Circuit.

The Plaintiffs submit that the Court should exercise its plenary discretion to impose an appeal bond against Objector Andrews in the amount of \$608,972.28 and for such other and further relief as this Honorable Court deems just, proper and equitable. The Court should exercise its discretion after consideration of the public policy driving the assessment of Appellate Bonds and the law of the Ninth Circuit after consideration of grounds set forth by the Plaintiffs.

Dated: February 10th, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on February 10th, 2010, a copy of the foregoing ***Memorandum in Support of Plaintiffs' Motion for Appeal Bond for Objector Fatima Andrews*** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Robert J. Bonsignore
Robert J. Bonsignore